

March 2012

Hon. Ernest L. Johnson, Chair
Hon. Richard M. Smith, Vice Chair
Scott M. Schultz, Executive Director



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To Use or Not to Use

It's been almost been six months on the job and I'm slowly identifying trends in sentencing. While my stint as the executive director has been a whirlwind to this point, organizing a Commission workshop and most recently shepherding important sentencing legislation through the process, I am also the Commission's staff attorney. I assist judges, attorneys, and probation officers in making sense out of an ever-changing body of criminal sentencing law. One of the most requested items from PSI writers throughout the state is the application of the special sentencing rules. They have multiplied in recent years and confusion has easily taken up residence, specifically when analyzing whether to use juvenile adjudications or out-of-state convictions to enhance the offender's sentence. It is important to distinguish whether such a conviction is being used for criminal history scoring or for sentence enhancement (special rules) purposes.

Criminal History Scoring Use

Generally adjudications and out-of-state comparable felonies are counted for criminal history purposes. K.S.A. 2011 Supp. 21-6811(e). Out-of-state adjudications are also treated as Kansas adjudications. K.S.A. 2011 Supp. 21-6810(f). Exceptions to scoring exist when juvenile adjudications are deemed to have decayed. K.S.A. 2011 Supp. 21-6810(d)(3) and (d)(4).

Sentence Enhancement (Special Rules) Use

But in enhancement situations where special sentencing rules are involved, most of the statutory provisions only refer to Kansas statutes. As a result, it would seem that if the legislature wanted to include any adjudications or foreign convictions it could have done so. A strict construction or reading of the statute gives this result. In *State v. Dale*, 2 Kan.App.2d 1043, 220 P.3d 1102 (2009), the court specifically addressed the issue of prohibiting the use of adjudications for sentence enhancement. The court reasoned:

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Have a



Have you ordered yours?

2011 Kansas Sentencing Guidelines Desk Reference Manual (DRM)

This popular tool is available in a manual or CD. It is also on our [web site](#).

[Fill out this order form](#) and send your payment with the form to us. Thank you.

2012 Legislative Update

We are tracking the following bill that may have significant impact on the sentencing guidelines:

S Sub for Sub for HB 2318:

This bill would make several changes to the statutes governing controlled substances, including the adoption of a drug sentencing grid with five levels. The grid would add a new severity level 2 with penalties falling between the current first and second levels of the drug grid.

This bill also modifies the SB 123 nonprison sanction program and expands the probation and border boxes of the drug grid.

2011 Annual Report

The Kansas Sentencing Commission Annual Report is statistically analyzing sentencing practice and policies under Kansas Sentencing Guidelines.

During FY 2011, the Commission received a total number of 14,003 felony sentences, indicating an increase of 1.4% over that of FY 2010. Of the total number of sentences, 4,958 (35.4%) were prison sentences, 8,270 (59.1%) were probation sentences and 775 (5.5%) were county jail sentences. Nondrug sentences represented 71.8% or 10,059 sentences and drug sentences accounted for 28.2% or 3,944 sentences.

[View the entire report](#)

**2003 Senate Bill 123**

K.S.A. 2011 Supp. 21-6824
(formerly K.S.A. 21-4729)

Provides for community supervision (in lieu of incarceration) and mandatory substance abuse treatment for a defined target population on non-violent adult drug offenders who have been convicted of a drug offense under K.S.A. 2011 Supp 21-5706. (formerly K.S.A. 21-36a06)

GOAL: To provide community intervention and the opportunity for treatment to certain offenders with substance abuse problems in order to address more effectively the revolving door of drug addicts through the state prisons, which should be reserved for serious, violent offenders.

SB123 questions—

Please email Jennifer Dalton,
jenniferd@sentencing.ks.gov
or call with any questions.

ASI Training in
April and May.

Where: Lawrence, Ks

To register

[view the brochure](#)

March Case Law Updates

- [State v. Coman](#) – March 30, 2012 – Sedgwick – Reversed, No. 100,494 (Offender Registration).
- [State v. Stawski](#) – March 23, 2012 – Geary – Affirmed, No. 104,349 (Departure Sentence).
- [State v. Turner](#) – March 9, 2012 – Sedgwick – Vacated and remanded, No. 102,594 (Sentencing, Lenity).
- [State v. Gaona](#) – March 2, 2012 – Finney – Affirmed in part, reversed in part, and remanded, No. 98,822 (Constitutionality, Sentencing).
- [State v. Williams](#) – March 2, 2012 – Jewell – Affirmed, No. 104,909 (Criminal History, Sentencing).

FY 2012 KDOC Inmate Classification Projections

The custody classification projection addresses the types of beds that the state needs for the total number of beds projected in the baseline projection. This includes the number of maximum, medium high, medium low, minimum, special management and unclassified beds needed to accommodate the inmate population. [View the report](#)

2012 Prison Population Projection Report

In an attempt to formulate the most accurate assumptions, the Sentencing Commission utilizes a Prison Population Consensus Group to review and establish the final set of assumptions that are utilized in building the simulation model. Members of the Consensus Group represent various criminal justice agencies which play a role in processing an individual through the criminal justice system. Members contribute their agencies' expertise regarding formal and informal procedures and provide relevant information and data on specific issues or practices which may affect prison population. Thank you for your contribution. [View the report.](#)

Senate Bill 123 News

Treatment Providers: Please remember:

- Send All ASI's to us (KSC).
- In addition to monthly invoicing, the KSC accepts weekly or bi-weekly invoices for faster processing.

Community Corrections:

- If you receive an ASI – please forward it to us (KSC).
- Our office gladly prefers invoices emailed to jenniferd@sentencing.ks.gov, or faxed to **785-296-0927** in care of Jennifer.

A Friendly Reminder- SB 123 Offender Reimbursement- \$300

As it is noted on the PSI, and the JE, (where costs are proposed and ordered)
Please try to collect at least \$300. *Thank you for your efforts.*





Kansas Sentencing Commission

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Did you know...

You can E-mail your Journal Entry (JE), Probation Revocation, or PSI forms to us as an alternative to mailing them?

Just like everyone these days, we are always looking for ways to cut costs. Save paper and postage!

E-mail to:

chrisc@sentencing.ks.gov

Journal Entry of Judgment (JE) and PSI News

It is important for us to keep you informed and provide you with forms containing the most current changes.

The JE and PSI have been provided with many separate documents all together for years. We have separated the JE and the PSI forms to provide individualized documents for times when no extra forms are needed (example: Special Rules page, Addition Offenses, Offender Registrations, etc.)

Separating these documents will also provide options when extra forms are all you need.

To access the form(s) of your choice...

[Click here](#)

Revised Forms 8/2011:

- Journal Entry of Judgment (JE)
- Probation Revocation
- Presentence Investigation (PSI)

Due to the many **NEW** changes made in the forms— there are **highlighted versions** to show what, where and how things changed.

We also provide the KBI Offender Registration Forms

These can also be found on our web site.



If you email JE's—
please include the following:

- JE
- PSI
- Date of Birth
- Criminal History worksheet

Offender Registration Requirement K.S.A. 2011 Supp. 22-4902

Under the new Act the court sentencing an offender subject to the Act must not only inform the offender of the registration requirements but also, when that offender is granted some form of probation, see that the initial registration forms are completed. To get forms - [click here](#)

Attention

When completing JE and PSI's please include the **ENTIRE statute number - including subsections**

Similar offenses are separated by these subsections

Example:

21-5705(a)(1)(c)(1) - [formerly 21-36a05(a)(1)] **Drugs; Cultivate, distribute, or possess w/ intent to distribute opiates, cocaine, meth, narcotics and the like.**



**REGISTRATION
REQUIRED!**

21-5705(a)(2)(c)(1) - [formerly 21-36a05(a)(2)] **Drugs; Cultivate, distribute, or possess w/ intent to distribute marijuana, depressant, stimulants and the like.**



**NO REGISTRATION
required!**

Please contact Carrie Krusor if you have **ANY** questions (785) 296-0923.

Thank You!



Kansas Criminal Justice System Resource Directory

A Message to Entities Referenced in the Kansas Criminal Justice System Resource Directory-

The staff of the Kansas Sentencing Commission hopes the Resource Directory will be a valuable aid to you and your staff. Every effort has been made to ensure complete and accurate information. In order to maintain maximum efficiency of this directory, please keep us apprised of updates by emailing changes to: office@sentencing.ks.gov.

If **your** information in this **Resource Directory** has changed, please use this **revision form** to let us know.

Thank you to those who help us keep your information accurate!

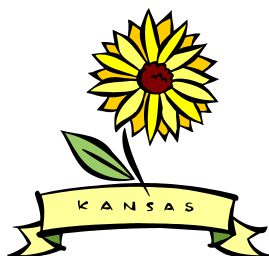
* Please feel free to print your own copy. *



Kansas Sentencing Guidelines Desk Reference Manual (DRM)

The Kansas Sentencing Commission Desk Reference Manual ...

provides general instructions for application of the provisions of the Kansas Sentencing Guidelines Act (KSGA) K.S.A. 21-4701 *et seq.* The Manual contains features that we hope will not only inform users of the latest developments in sentencing law 2010, but also help to facilitate more efficient understanding and application of the law.



Please check to see the current rate for **your** city or county -

2012 Sales Tax Rates

2010 Desk Reference Manual (DRM)

To order yours!

(Please send payment with the order form.)

2011 DRM

... order yours!

Mail completed form with your payment.

We will continue to provide you with information and changes as necessary.

To remove your name from our mailing list, please [click here](#).
Questions or comments? E-mail us at sentencing@sentencing.ks.gov
We welcome your questions – call us at 785-296-0923

The legislature is aware that juvenile adjudications do not constitute criminal convictions. In drafting the Sentencing Guidelines Act, the legislature took great care to include criminal convictions and juvenile adjudications as part of the criminal history computation. Had the legislature meant for juvenile adjudications to be counted as convictions for the purpose of enhancing the crime severity level, it certainly could have drafted the statute to include them. [Citation omitted].

State v. Boyer, 289 Kan. 108, 209 P.3d 705 (2009), held that juvenile adjudications are not to be considered in the determination of persistent sex offender status under K.S.A. 21-4704(j), now codified as K.S.A. 2011 Supp. 21-6804(j).

The *Boyer* decision affirmed a published decision of the Court of Appeals. In addition to the *Boyer* Court's own analysis it cited with approval the following analysis from the published opinion of the Court of Appeals:

[G]eneral rules of statutory interpretation also support Boyer's argument. First, the plain words of the statute reference juvenile adjudications in the general provision for calculating criminal-history scores but not in the specific provision determining who may be classified a persistent sex offender. Specific statutes generally control over more general ones. *In re K.M.H.*, 285 Kan. 53, 82, 169 P.3d 1025 (2007). Second, as the Kansas Supreme Court recognized in *In re W.H.*, the expression of one thing in a statute generally implies the exclusion of others. The juvenile- and adult-sentencing statutes are inter-related and have been carefully crafted. Juvenile adjudications are clearly referenced in several other adult sentencing statutes so we find the lack of explicit reference to them in the statute defining persistent sex offenders significant. It is unlikely that this omission was an accident. Third, under the rule of lenity, penal statutes are narrowly construed in favor of the defendant. *State v. Zeit*, 39 Kan.App.2d 364, Syl. ¶ 3, 180 P.3d 1068 (2008); *In re J.E.M.*, 20 Kan.App.2d at 600, 890 P.2d 364. To the extent that K.S.A. 21-4704(j) is ambiguous about whether juvenile adjudications may be used to classify someone as a persistent sex offender, we construe the statute in the defendant's favor.... It is within the legislature's authority to say that juvenile adjudications may be used for this purpose. But such authority should be clearly granted, not implied from ambiguous language. 40 Kan.App.2d at 322-23.

[In *State v. Sims*, 40 Kan.App.2d 119, 122, 190 P.3d 271 (2008), the court held that K.S.A. 21-4603d(f) does not allow for consecutive sentences based upon previous juvenile adjudications. K.S.A. 21-4603d(f)(1) requires consecutive sentences for adult felonies but does not mention juvenile adjudications. The court again noted the significance of the "lack of explicit reference" to juvenile adjudications in the statute. 40 Kan.App.2d at 121.

Conclusion

While I have not found any cases to suggest that out-of-state convictions should not be used in special rule instances, the *Boyer* analysis could be very easily transferred from juvenile adjudications to out-of-state convictions.

I hope this was instructive to those that may be struggling with this dilemma. If this issue crosses your desk, you will be armed a little bit better to make a determination whether to use or not to use these categories of prior offender history for sentence enhancement purposes.

Scott M. Schultz
Executive Director